

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE PHILLIPS JA  
THE HON MRS JUSTICE SINCLAIR-HAYNES JA  
THE HON MISS JUSTICE SIMMONS JA (AG)**

**SUPREME COURT CIVIL APPEAL NO COA2019CV00016**

<b>BETWEEN</b>	<b>DESMOND KINLOCK</b>	<b>APPELLANT</b>
<b>AND</b>	<b>DENNY McFARLANE</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	<b>PATRICK CAMPBELL</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	<b>ATTORNEY GENERAL</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>AND</b>	<b>COMMISSIONER OF POLICE</b>	<b>4<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	<b>COMMISSIONER OF CORRECTIONS</b>	<b>5<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	<b>JUNE SPENCE-JARRETT</b>	<b>6<sup>TH</sup> RESPONDENT</b>
<b>AND</b>	<b>HECTOR SMITH</b>	<b>7<sup>TH</sup> RESPONDENT</b>

**Written submissions filed by Ballantyne Beswick & Company for the appellant**

**Written submissions filed by the Director of State Proceedings for the respondents**

**2 December 2019 and 21 May 2021**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**PHILLIPS JA**

[1] I have read in draft the judgment of Simmons JA (Ag) and agree with her reasoning and conclusion. I have nothing further to add.

## **SINCLAIR-HAYNES JA**

[2] I too have read the draft judgment of Simmons JA (Ag) and agree.

## **SIMMONS JA (AG)**

[3] We recognize that there has been considerable delay in dealing with this matter and sincerely apologize for the same.

### **Introduction**

[4] On 8 November 2013, the respondents (the defendants in the court below) filed an application to strike out certain parts of the amended particulars of claim filed by the claimant on several bases. Among the reliefs sought, was an order to strike out the claim against all respondents save the Attorney General as, based on the Crown Proceedings Act, the said Attorney General was the proper party to the proceedings. On 15 February 2019, Palmer J struck out certain parts of the said particulars of claim on the bases that they were prolix and that the claim for breach of social contract was not a cause of action known to Jamaican law. The claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents (‘the other respondents’) was also struck out. The claimant, Mr Desmond Kinlock, now the appellant, was granted leave to appeal. The appellant acted with dispatch and filed a notice of appeal on 18 February 2019, seeking the following orders:

- “1. That the decision of the Honourable Mr. Justice Dale Palmer be set aside in part;
2. Paragraphs 50, 51 and 52 of the Particulars of Claim are reinstated;
3. The claim for breach of social contract is reinstated;
4. The claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents is reinstated;
5. The Claimant shall file a Further Amended Claim and Particulars of Claim in accordance with the orders herein within fourteen (14) days of the receipt of this judgment;

6. Costs of the appeal and of the applications in the Court below be taxed or agreed for the Appellant herein with taxation authorized;
7. That the matter be remitted to the Supreme Court for a Case Management Conference to be fixed within this term/sitting;
8. That the Respondents be directed to file an Amended Defence within 42 days of the judgment hereof, responding to the Claimant's Further Particulars Claim filed pursuant to the orders herein;
9. Such further orders as this Honourable Court deems fit."

[5] This court has had the benefit of a detailed written judgment containing the learned judge's reasons.

### **Background**

[6] The claim in this matter, which was filed on 4 May 2013 and amended on 2 April 2013, was brought against seven defendants, now respondents. Various reliefs were sought against them arising out of a joint police-military operation which took place, on or about 15 December 2009, at premises occupied by Mr Desmond Kinlock ('the appellant'). Following the operation, the appellant was arrested and charged. He was held at the Horizon Remand Centre from December 2009 until December 2010. The matter was tried in 2011 and the charges against the appellant were dismissed. As such, the criminal proceedings have been disposed of.

[7] The amended particulars of claim spanned some 29 pages.

### The parties

[8] The 1<sup>st</sup> and 2<sup>nd</sup> respondents, Denny McFarlane and Patrick Campbell, are members of the Jamaica Constabulary Force, the 3<sup>rd</sup> respondent is the Attorney General, the 4<sup>th</sup> respondent is the Commissioner of Police, the 5<sup>th</sup> respondent is the Commissioner of Corrections, the 6<sup>th</sup> respondent, June Spence-Jarrett, is the individual who held the office

of the Commissioner of Corrections, and the 7<sup>th</sup> respondent, Hector Smith, is the Superintendent at the Horizon Remand Centre. It should be noted that, save for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, all the respondents were personally named.

### The relief sought

[9] For clarity and ease of comprehension, it is useful to set out the details of the claim including the numerous causes of action and relief sought. The appellant claimed damages against the respondents for (1) assault and battery, (2) malicious procurement of arrest, (3) false imprisonment, (4) malicious prosecution, (5) injurious/malicious falsehood, (6) misfeasance in public office, (7) breach of social contract, and (8) multiple breaches of his constitutional rights.

[10] The claim was further particularised as follows:

“a. Against the 1<sup>st</sup> to 4<sup>th</sup> defendants, special damages, and damages for loss of earnings;

b. Against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, damages for assault and battery, malicious procurement of arrest and malicious prosecution;

c. Alternatively, against the 1<sup>st</sup> to 4<sup>th</sup> defendants, damages for assault and battery, false imprisonment, malicious prosecution, injurious falsehood, and misfeasance in public office;

d. Against the still unknown police officers at the Elleston Road Police Station, damages for assault and battery and cruel, unusual and inhumane treatment and punishment for their treatment of the claimant while they were interrogating him;

e. Alternatively, against the 3<sup>rd</sup> and 4<sup>th</sup> defendants damages for assault and battery and cruel, unusual and inhumane treatment and punishment for the treatment of the claimant while he was being interrogated at the Elleston Road Police Station;

f. Against the 6<sup>th</sup> and 7<sup>th</sup> defendants and the still unknown members of the management team and Corrections Officers

who were present and on duty during the period of the food riot for their cruel, inhumane and unusual punishment and intentional deprivation of the claimant's quality of life whilst he was housed at the Horizon Remand Centre;

g. Alternatively, against the 1<sup>st</sup> to 5<sup>th</sup> defendants, damages for cruel and unusual punishment and the intentional deprivation of the claimant's quality of life whilst housed at the Horizon Remand Centre;

h. Against the 1<sup>st</sup> to 4<sup>th</sup> defendants, aggravated damages on the footing that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants were deliberate and/or reckless and amounted to an oppressive abuse of the powers granted to the 1<sup>st</sup> and 2<sup>nd</sup> defendants which were intended to be used in protection of the claimant instead of to abuse and oppress him;

i. Against the 1<sup>st</sup> to 4<sup>th</sup> defendants, exemplary damages on the footing that any sum awarded for compensatory and aggravated damages will be insufficient both to reflect the gravity of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' conduct and to deter the 3<sup>rd</sup> and 4<sup>th</sup> defendants from permitting their servants and/or agents and/or employees of the Government of Jamaica from acting similarly in the future and further that the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants amounted to oppressive, arbitrary and unconstitutional action by servants of the government;

j. Against the 3<sup>rd</sup> defendant, damages for breach of contract and an account of all taxes extracted by mandatory compulsion of the Government of Jamaica from the claimant's earnings, and payment of the sum so found on the taking of the account and interest on the same at a commercial rate of interest for such period as to this Honourable Court may seem just;

k. Against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants a declaration that if and for as long as the 1<sup>st</sup> and 2<sup>nd</sup> defendants remain employed by the Jamaica Constabulary Force or any unit or sub-unit thereof, or any agency of the Government of Jamaica which can be considered to form a part of the security forces, once they apply or are considered for engagement or promotion or renewal of their contracts of service, that the claimant and his chosen legal representatives are also invited to make submissions to the 4<sup>th</sup> defendant or other appropriate officer

in respect of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' application for engagement, promotion, or re-instatement;

l. Interest on all other damages claimed at such rate and for such period as to this Honourable Court may seem just;

m. Costs and Attorneys-at-Law costs"

[11] Acknowledgements of service were filed by the Director of State Proceedings on behalf of all respondents as set out below:

19 March 2013                      3<sup>rd</sup> respondent

19 September 2013              4<sup>th</sup> and 5<sup>th</sup> respondents

14 October 2013                  1<sup>st</sup>, 2<sup>nd</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents

[12] In the court below, the respondents by way of a further amended application for court orders filed 8 November 2013, sought orders, (1) striking portions of the claim as being prolix, (2) striking out the claim against all the respondents, save for the 3<sup>rd</sup> respondent ('the Attorney General') and (3) striking out the claim for breach of social contract.

[13] As indicated previously, the learned judge granted, in part, the orders sought in relation to the particulars of claim being prolix and granted, in full, the orders sought in relation to the striking out of the claim against all the respondents, save for the Attorney General, and struck out the claim for breach of social contract.

### **The grounds of appeal**

[14] The grounds on which the appellant relies are:

"a. That the Learned Judge in Chambers erred in failing to recognize and appreciate that his judicial function required the exercise of a discretion which would permit the Appellant to have his claim heard, particularly as the claim is one against the state for having abused his rights under law and under the Charter of Fundamental Rights and Freedoms.

b. That the Learned Judge in Chambers erred in exercising his discretion against the weight of the constitutional rights of the Appellant and failing to take these rights into account, and instead ruled in a manner consonant with a judicial culture of support for the Crown and its agents. The claim by the Appellant is predominantly in respect of false imprisonment and malicious prosecution and is therefore effectively a claim pursuant to Section 13(3)(a) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 being the constitutional right to liberty, which ought to be jealously guarded and protected within the Court's jurisdiction.

c. That the Learned Judge failed to acknowledge that the new appreciation of constitutional rights, is that their application is both horizontal and vertical, that is to say the Respondents had an obligation, and even more so as agents of the State, not to violate the constitutional rights of the Appellant herein and accordingly such a violation gives rise to a cause of action for breach of a private right by the Appellant against the Respondents, and further that the Constitution creates a social contract between its subjects and the crown and her officers/agents/servants.

d. That in all the circumstances, the judge wrongly exercised his discretion as it relates to striking out the claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents in light of the serious allegations of wrongdoing and constitutional infringements at the hands of the Respondents in abusing public office and that the pleadings relied on to support these claims have been placed before the Court in the Appellant's Particulars of Claim. Further the learned Judge fell into error when he accepted that the Respondents being Crown servants, performed their functions whilst in the employ of the Crown and further sought to evaluate evidence at this interlocutory stage of the proceedings when the pleadings before the Court did outline why the said Respondents were functioning outside of their statutory functions and were deemed to be on a frolic of their own.

e. That the Learned Judge wrongly exercised his discretion in striking out the claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents for the reason that the 3<sup>rd</sup> Respondent, the Attorney General, is the proper party to the claim. The acts of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents were committed

outside the scope or ambit of their duties and they should therefore be held jointly or severally liable. Moreover, a claim for damages, which the Appellant has substantially claimed herein, should be enforced against these individual crown servants who caused suffering and hardship to bear on the Appellant. Removing the parties from the claim against whom such an order may be enforced, in effect renders the claim inutile and is an affront to justice, and further offends the administration of justice in this jurisdiction.

f. That in any event, even if the actions of the Respondents which were struck out, were within the jurisdiction granted to them, on the authority of *M v Home Office*, these parties remain personally liable with the right to be indemnified by the crown through the Attorney General of Jamaica. It is in the interest of justice and confidence in the administration of justice, that the Respondents be required to answer the allegations of the constitutional breaches being made against them personally and do not hide behind submissions that the Appellant's Statement of Case, which the learned Judge deemed to be evidence, which we contend is incorrect, did not disclose them acting outside their duties.

g. That the finding by the Learned Judge that the claim against all the Respondents, save the 3<sup>rd</sup> Respondent stands struck out is a complete miscarriage of justice because the effect of the ruling deprives the Appellant of any remedy whatsoever against the Crown officers personally, who did abuse their public office in causing the Appellant pain and suffering and are guilty of malfeasance in public office."

[15] These grounds raise three issues which can be conveniently framed as follows:

- (1) Whether the claim should have been struck out against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents – ***grounds d, e, f and g***
- (2) Whether the claim for breach of the social contract should have been struck out – ***ground c***
- (3) Whether the striking out of the claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents and the breach of the social contract

deprives or prevents the appellant from obtaining damages for breach of his constitutional rights – *grounds a, b, c*

**Issue 1: Whether the claim should have been struck out against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents – grounds d, e, f and g**

Submissions on behalf of the appellant

[16] Counsel for the appellant submitted that the court's discretionary power to strike out a claim should generally be exercised with extreme caution and proportionality as it is a severe and even draconian measure. Reference was made to the cases of **S & T Distributors Ltd and anor v CIBC Jamaica Ltd and anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 112/2004, judgment delivered 31 July 2007, **Herbert A Hamilton v Minister of National Security and the Attorney-General of Jamaica** [2015] JMSC Civil 39 and **Peerless Ltd v Gambling Regulatory Authority and others** [2015] UKPC 29 in support of that submission.

[17] It was submitted that Palmer J wrongly exercised his discretion in striking out the claim against the other respondents, for the reason that the Attorney General was the only proper party to the claim. Counsel further submitted that the acts of the other respondents were committed outside the scope or ambit of their duties and, as such, they would have been on a frolic of their own. In such circumstances, the other respondents would be personally liable, and any damages awarded to the appellant should be enforced against them, as it was their actions which caused the undue pain and suffering to the appellant.

[18] In the alternative, it was argued that even if the actions of the other respondents were within the scope of their authority, based on **M v Home Office** [1993] UKHL 5, they would remain personally liable, with the right to be indemnified by the Attorney General.

[19] In this regard, the attention of the court was directed to the dictum of Lord Woolf in **M v Home Office** which traced the development of the law in relation to bringing

suits against the Crown prior to the Crown Proceedings Act 1947, and the position thereafter. Lord Woolf opined at pages 17 to 18:

“The position so far as civil wrongs are concerned, prior to the Crown Proceedings Act, can be summarised, therefore, by saying that as long as the plaintiffs sued the actual wrongdoer or the person who ordered the wrongdoing he could bring an action against officials personally, in particular as to torts committed by them and they were not able to hide behind the immunity of the Crown. This was the position even though at the time they committed the alleged tort they were acting in their official capacity...

The difficulty which a plaintiff might have in identifying the appropriate servant of the Crown who was the tortfeasor in practice was overcome by the Crown nominating the individual responsible for the damage and the lack of resources of the defendant did not cause problems since the Treasury would make an ex gratia payment of compensation if it was a case where, but for Crown immunity, the Crown would be vicariously liable. In such proceedings, if it was appropriate for an injunction to be granted, there was no reason why this should not be done.

It was the criticisms in *Adams v. Naylor* [1946] A.C. 543, and the cases which applied those criticisms, of the practice of the Crown nominating a defendant who might not have been personally guilty of any tort which were the catalysts for the changes which were brought about by the Crown Proceedings Act 1947...

So far as civil proceedings were concerned the position was transformed by the Crown Proceedings Act 1947. Section 1 enabled the Crown to be sued directly in those situations where prior to the Act a claim might have been enforced by petition of right. Section 2 in general permitted actions to be brought against the Crown in respect of torts committed by its servants or agents for any breach of its duties which gave rise to a tortious liability (including a breach of statutory duty where the breach created a cause of action). Section 2 did not remove the right to sue the actual tortfeasor.”

[20] It was submitted that the House of Lords, therefore, confirmed that the Crown Proceedings Act, properly interpreted, confirmed the right of a litigant to sue a tortfeasor who is a Crown servant. In so doing, any notion of special privilege or immunity from suit has been dispelled. Counsel further submitted that the approach of Lord Woolf was accepted as correct in **Alton Washington Brown v The Gleaner Company Limited and others** [Consolidated claims] (unreported), Supreme Court, Jamaica, Suit No CL 2000/ B 166, judgment delivered 5 November 2001. In that case, Rattray J opined that section 3 of the Crown Proceedings Act "permits the aggrieved party to sue the Crown in certain instances whereas before either no right existed, or it was a lengthy or protracted process. The section is not authority (for the premise) that the individual servant or agent ought not to be sued".

[21] It was submitted that on a proper interpretation of the Crown Proceedings Act, claimants are not precluded from bringing claims against Crown servants in their personal capacity but rather, are permitted to also sue the Crown based on the principles of vicarious liability. It was contended that, based on **M v Home Office** and **Alton Washington Brown v The Gleaner Company Limited and others**, the other respondents are proper parties to the claim and the learned judge therefore erred in finding that the claim against them could not succeed unless it could be shown that the acts alleged were not closely connected to their duties.

[22] Counsel also submitted that the claim was not an abuse of the court's process. It was asserted that the removal of the other respondents as parties to the claim would render the claim inutile insofar as they are the parties against which an order may be enforced. It was further submitted that their removal was an affront to justice, and offended the administration of justice.

[23] In addressing the decision in the **Attorney General v Gladstone Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 95/1997, judgment delivered 24 May 2000 ('**Gladstone Miller**'), which was relied on by the respondents, in support of their submission that where a Crown servant was acting in the

course of his employment, the proper party is the Attorney General, it was argued that such an approach would be inappropriate in the circumstances of this case. It was submitted that the actions of the other respondents in the instant case, "went well beyond their capacities as state agents" and, as such, Palmer J erred when he struck out the pleadings against them. Reference was made to **Feather v the Queen** (1865) 6 B & S 257, 296 where it was stated as follows:

"As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown".

Reference was also made to **Musgrave v Pulido** (1879) 5 App Cas 102 and **Raleigh v Goschen** [1898] 1 Ch 763, in support of that submission.

[24] In conclusion, it was submitted that the decision to strike out the claim against the other respondents at this stage was prejudicial to the appellant. The other respondents, on the other hand, it was contended, would suffer no prejudice as, if it is proved that they performed their duties lawfully, no peril could befall any of them.

#### Submissions on behalf of the respondents

[25] Counsel for the respondents submitted that the learned judge did not err in striking out the claim against the other respondents. It was stated that Palmer J's reliance on section 13(2) of the Crown Proceedings Act and the dictum of Bingham JA in **Gladstone Miller**, was well-placed. It was also pointed out that Palmer J had observed that the pleadings had alleged that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were functioning as Crown servants whilst asserting they were acting outside of their authority.

[26] It was further submitted that the dictum of Bingham JA made it clear that the Crown Proceedings Act did not abolish the right to sue a Crown servant. However, where the relevant circumstances demonstrated that the Crown servant was acting in his capacity as an employee, that is, in the course of his employment, the Crown, in accordance with section 13(2) of the Crown Proceedings Act would be liable. In those

circumstances, it was submitted that the proper party to be sued would be the Attorney General. This, counsel submitted, was consonant with the dictum of Lord Woolf in **M v Home Office**, which was relied on by counsel for the appellant.

[27] The court was also referred to the case of **Peter Kavanaugh v The Attorney General and Det Inspector Carey Lawes** [2012] JMSC Civil 154 (**Peter Kavanaugh**) in which F Williams J (as he then was) applied the reasoning from **Gladstone Miller** and struck out the claim against the second defendant (Detective Inspector Carey Lawes) and ordered that the matter should proceed only against the Attorney General.

[28] Turning to the question of whether the other respondents in this case, were acting in the course of their employment or in their personal/private capacity, reference was made to paragraphs 2 to 8 of the particulars of claim which essentially described the function of each party and their role in the acts complained of; all of which counsel for the respondents contended were alleged to have been done while on duty as police officers or employees of the correctional services. Counsel stated that the particulars of claim detail the sequence of events which led to the appellant being charged and held at the Horizon Remand Centre. The alleged wrongful acts of the officers at that facility were also pleaded. It was submitted that it was clear from the pleadings that the claim was in respect of acts committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents while acting as agents of the State and the 4<sup>th</sup> to 7<sup>th</sup> respondents while carrying out their duties in connection with the administration of the Horizon Remand Centre. Those persons, it was stated, were all servants of the Crown. In such circumstances, it was submitted that the learned judge was correct in his observation that the appellant's pleadings lacked any allegation of how the other respondents were acting in their personal/private capacity.

[29] Since the pleadings did not demonstrate that the other respondents were acting in a personal/private capacity, counsel submitted that the learned judge did not need to address his mind to the issue of whether the respondents would be able to present evidence that their acts were authorised. Reliance was placed on **Clinton Bernard v**

**The Attorney General of Jamaica** [2004] UKPC 47 (**Clinton Bernard**), which established that the test in relation to vicarious liability of the employer is not whether an unlawful act was done, but whether the act was so closely connected with the nature of the duties of the employee so as to make the employer liable. It was submitted that when this test is applied, it is clear that the acts complained of were done in the course of the other respondents' employment.

[30] Counsel further submitted that although no defence had been filed, the evidence in support of the Attorney-General's application before the learned judge made it clear that there was no dispute that the other respondents were acting in the course of their employment. The court was specifically directed to paragraphs 4 and 5 of the second affidavit of Alicia McIntosh filed in support of the application, wherein it was stated *inter alia* that the Director of State Proceedings acknowledged service for all of the named defendants (respondents before this court) and that the allegations concerned acts done and pleaded to have been done in the course of their duties as servants or agents of the Crown, accordingly the proper party was the Attorney General.

[31] In the circumstances, it was submitted that it was clear from the documents that were before Palmer J, that the claim was brought in relation to acts done by servants or agents of the Crown in the course of their employment and, as such, the proper party was the Attorney General. There was therefore no error of law or misunderstanding of the evidence or any other basis on which this court could interfere with the exercise of his discretion.

### **Analysis and findings on issue 1**

[32] The claim in this matter was filed against the other respondents who were all employees of the State. It was averred in the amended particulars of claim that at all material times they were servants or agents of the State and were either acting on the instructions of their employer, or were responsible for the management and supervision of other Crown servants.

[33] Where the Attorney General is concerned, paragraph 4 of the amended particulars of claim (filed 2 April 2013), states clearly that the 3<sup>rd</sup> defendant was sued in a representative capacity as the acts complained of were allegedly committed by the other respondents whilst employed to the State. Paragraph four of the amended particulars of claim states:

“The 3<sup>rd</sup> defendant is the legal face of the Government of Jamaica and is joined in this suit as **the claim is being made against agents of the State while they were employed to the Government of Jamaica**, through the Jamaica Constabulary Force and the Department of Correctional Services **and were at all relevant times acting on instructions from their employer.**”(Emphasis added)

This raises the issue of vicarious liability.

[34] Palmer J at paragraphs [48] and [49] of his judgment stated as follows:

“[48] **The claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants cannot succeed. The claim is against the Crown arising from the allegedly tortious actions of Crown servant or agent, that being committed in the execution of his duty as a Crown servant or agent. In the circumstances, the only proper defendant, is the 3<sup>rd</sup> Defendant, that being the Attorney General.**

[49] The claimant has alleged that, at all material times, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were functioning as Crown servants or agents and has pleaded that the Defendants were acting outside of their duties prescribed by the Constabulary Force Act. However, what the pleadings lack is any allegation of **how** the Defendants were acting in any personal or private capacity. Counsel on behalf of the 3<sup>rd</sup> Defendant/Applicant has submitted that the allegations and as pleaded were done while the Defendants were in the employ of the Crown. I find that the claim could not succeed unless the Claimant/Respondent can show that the acts alleged were not closely connected to their duties as Crown servants. **If the Defendants are able to present evidence that they were authorised to conduct their duties, no matter**

**how improper it may have been alleged to have been, then I find that close connection to their duties has been established.”** (Emphasis supplied)

[35] Counsel for the appellant submitted that the learned judge erred when he struck out the claim against the other respondents. It was further submitted that they should be held personally liable as the acts complained of were committed outside the scope or ambit of their duties. It was contended that, in any event, they could be held to be jointly or severally liable. Counsel also further submitted that the Crown Proceedings Act did not preclude a claimant from suing a Crown servant in his personal capacity.

[36] Counsel for the respondents submitted, that although a claim could still be brought against a Crown servant, “...where the relevant circumstances demonstrated that the Crown servant was acting in his capacity as an employee, that is, in the course of his employment, the Crown would be liable and therefore the party to be sued would be the Attorney General”. It was also submitted that the “pleadings are replete with instances which indicate that all of the acts complained of were done by persons while on duty as police officers or employees of the Correctional Services”.

[37] Counsel for the respondents further submitted that, based on authorities such as **Clinton Bernard**, the test is whether the act which was done “was so closely connected with the nature of the duties the employee was employed to do so as to make the employer liable...When this test is applied, it is clear the alleged acts of the other respondents were done in the course of their employment”. Paragraph 5 of the second affidavit of Alicia McIntosh was relied on to ground that submission. It states as follows:

“5. That the allegations made in the claim against the First, Second, Fourth, Fifth, Sixth and seventh Defendants are allegations concerning actions done and pleaded to have been done in the course of their duties as servants and or agents of the Crown. **In the circumstances the proper party to the instant claim is the Attorney General.**” (Emphasis supplied)

[38] The appellant has however raised the issue of whether the other respondents were on a frolic of their own. At paragraph 38 of the amended particulars of claim it was posited that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' acts were not undertaken "...as part and parcel of their employment with the Jamaica Constabulary Force, but were acting as common thugs or rogue police officers on a '*frolic of their own*' and should be held personally liable for the Particulars of Assault and Battery...". This approach seems to have been geared towards addressing the issue of personal liability in the event that the actions of the other respondents were not found to be closely connected to their employment as servants or agents of the Crown.

[39] Paragraphs 2 to 8 of the amended particulars of claim, which essentially describe the function of each party and their role in the acts complained of, indicate that the other respondents were acting in the course of their employment. However, even when it is alleged that a Crown servant has committed a tortious act in the course of his employment, it is well settled that a claim may still be filed against him in his personal capacity. That position was not changed by the Crown Proceedings Act (see **M v Home Office, Brady & Chen Limited v Devon House Development Limited** [2010] JMCA Civ 33 ('**Brady & Chen**'), and **Alton Washington Brown v The Gleaner Company Limited and others**).

[40] In **Brady & Chen**, Smith JA having referred to **M v Home Office** confirmed that the individual Crown servant may still be sued even where it was alleged that he was acting in the course of his employment. He stated at paragraphs [14], [16] and [22]:

"[14] We have also seen that the respondent is a government company. Its Memorandum of Association shows that its main object is to "maintain and develop the property known as Devon House...". One of its objects is "to let or lease any such premises or parts thereof...". It is reasonably clear that the respondent is part of the government machinery in relation to the operation of the Devon House Complex. Contrary to counsel for the appellant's submission, I am of the view that the respondent is a Crown entity. As such, it seems to me that any proceedings against the respondent should be instituted

against the Attorney General pursuant to section 13 (2) of the Crown Proceedings Act which reads:

'13 (1)...

(2) Civil proceedings against the Crown shall be instituted against the Attorney -General.'...

[16] ... As said before, the Instrument of Lease clearly stated that the respondent was the agent of the government. The fact that the respondent did not specifically sign "for and on behalf of" is no indication that it was acting in its private capacity. **A pleader should in my view, if in doubt, go against all three** - the Attorney General, the Commissioner of Lands and the respondent...

[22] ... **I should also state that where an agent or servant of the Crown commits a tort while acting in his official capacity the actual wrong doer or the person who ordered the wrong doing may be sued personally.** Such a tortfeasor may not hide behind the immunity of the Crown. This point was made clear by Lord Woolf in **M v Home Office**...". (Emphasis supplied)

[41] In that case the learned judge of appeal found that the respondent was a Government entity and, as such, the Attorney General ought to have been joined as a party to the claim.

[42] It is equally clear that, where it is alleged that the act complained of was committed by the Crown servant in the course of his employment, the Attorney General must be joined as a party to the claim. The Crown Proceedings Act according to Bingham JA in **Gladstone Miller** "...extended the principle of vicarious liability as between private persons falling into the category of master and servant or employer and employee" to the Crown.

[43] In **Clinton Bernard**, Lord Steyn, who delivered the judgment of the Board, provided a detailed analysis of the principles which ground an employer's liability for the tortious acts of an employee. In so doing, he examined the case of **Lister and others v Hesley Hall Ltd** [2002] 1 AC 215 in which the sexual abuse of children by the warden

of a school boarding house was held to have been "inextricably interwoven" with his duties. Lord Steyn stated at paragraph 18:

"In *Lister* a warden of a school boarding house had sexually abused resident children. The question was whether the employers were vicariously liable. In the leading opinion a single ultimate question was posed, namely [at 230C]:

**'... whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.'**

The four substantial opinions delivered in *Lister* revealed that all the Law Lords agreed that this was the right question. On the facts the members of the House unanimously took the view that the answer was "yes" because the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house. This decision did not come out of the blue. On the contrary, it was a development based on a line of decisions of high authority dating from *Lloyd v Grace, Smith & Co* [1912] AC 716 where vicarious liability was found established in cases of intentional wrongs. ***Lister* is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well-known formula, the question whether the act is "a wrongful and unauthorised mode of doing some act authorised by the master" is not entirely apt in cases of intentional wrongs: Salmond, *The Law of Torts*, 1907, 83, now contained in the current edition of Salmond and Heuston, *The Law of Torts*, 21st ed., 1996, 443. This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment**

**and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable.** In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee. This strand in the reasoning in *Lister* was perhaps best expressed by Lord Millett who observed (para 83, at 250D):

'... Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust.'

While the facts of *Lister* are very different from the circumstances of the present case, the principles enunciated in *Lister* are of general application to intentional torts." (Emphasis supplied)

[44] Vicarious liability is not dependent on any fault of the employer. As stated by Lord Steyn in **Clinton Bernard**, it is "a principle of strict liability". The other respondents have been sued as servants/agents of the Crown. The capacity in which each of the respondents has been sued is clear. The Attorney General was joined by virtue of the Crown Proceedings Act. In addition, as indicated in paragraph [11] above, acknowledgments of service were filed by the Director of State Proceedings on behalf of all respondents.

[45] In **Peter Kavanaugh**, which was referred to by the counsel for the respondents, F Williams J (as he then was), struck out the claim against Detective Inspector Lawes and ordered that the matter was to proceed only against the Attorney General. It is to be noted that, on appeal, this court upheld the decision (see **Peter Kavanaugh v The Attorney General and Det Inspector Carey Lawes** [2015] JMCA Civ 9). McIntosh JA, with whom the other members of the court agreed, had this to say on what she termed "the severance issue":

“[44] In my view, the law and the authorities would require the learned judge, without any prompting to address the joinder of the two parties named as defendants in the claim before him. It was not disputed that the named 2nd respondent was a crown servant and that he was acting in the course of his employment. Therefore, it would have been clear to the learned judge that the provisions of section 13(2) of the Crown Proceedings Act must apply to this claim. At paragraph [71] he said

‘All the acts alleged to have been done against the claimant were done by the 2<sup>nd</sup> defendant pursuant to his powers and duties as a member of the Jamaica Constabulary Force. [sic] and vicarious liability is not in issue.’

[45] Indeed, in **The Attorney General v Gladstone Miller**, Bingham JA with whom the other members of the court agreed, had this to say at page 9 of the judgment (after tracing the development of the law relating to civil suits against the Crown):

‘Although claims in tort could still be brought against the Crown-servant or employee alone, once it was established that he was acting within the course or scope of his employment the proper defendant to be sued was the Attorney General, he being the official representative of the Crown by virtue of his office. A suit against the servant or the employee alone therefore would be meaningless, as the Attorney General could enter an appearance and take over the defence of the suit. It is in this vein that section 13(2) of the Crown Proceedings Act mandates that ‘Civil Proceedings against the Crown shall be instituted against the Crown [sic].’”

[46] The appellant’s case, however, differs from the **Peter Kavanaugh** case as at the time when the application was made to strike out the claim against the other respondents, no defence had been filed by the Attorney General.

[47] Paragraph 5 of the second affidavit of Alicia McIntosh (see paragraph [37] above) does not, in our view, take the matter as far as was submitted by counsel for the Attorney

General. There is no positive averment in that affidavit or in any pleadings which makes it clear that the Attorney General is accepting that the Crown would be vicariously liable if the acts alleged are proved. In **Peter Kavanaugh**, the Attorney General, in its defence, took no issue with respect to vicarious liability. F Williams J stated:

**“It is to be observed as well that this is not one of those cases in which the Attorney General is raising an issue where the issue of vicarious liability is concerned. It is not seeking to disavow the actions of the Crown servant.** What is being contended is that the Crown servant acted without malice and with reasonable and probable cause. It is not being contended that he was on a frolic of his own. There is therefore no likelihood of the matter proceeding ultimately against the Crown servant alone.”  
(Emphasis supplied)

It was on that basis that the learned judge concluded that the Attorney General was the only proper party to the claim and that there was no need for the second defendant to remain a party.

[48] The appellant has also contended that the learned judge fell into error when he:

- (1) accepted that the respondents being Crown servants, performed their functions whilst in the employ of the Crown; and
- (2) further sought to evaluate evidence at this interlocutory stage of the proceedings when the pleadings before the court did outline why the said respondents were functioning outside of their statutory functions and were deemed to be on a frolic of their own.

[49] The learned judge, in the absence of a clear statement in the affidavits in the application before the court or by way of a defence, in our view, arrived a premature conclusion that the claim against the other respondents could not succeed against them in their personal capacity. He reasoned that if the other respondents were able to prove

that they were conducting their duties as employees of the State, their actions, however improper, would be closely connected to those duties. At this stage, the allegations had not been tested and there was no clear indication that vicarious liability was being accepted by the Attorney General. The Attorney General could, therefore, mount a defence that the other respondents were on a frolic of their own, which if successful, would leave the appellant up the proverbial creek without a paddle, once the said respondents were removed as parties to the claim. Such a result would be prejudicial to the appellant and clearly not be in the interest of justice.

[50] It is appropriate, at this juncture, to briefly state the function of this court which is that of review. As Sinclair-Haynes JA (Ag) (as she then was) put it in **Crown Motors Limited et al v First Trade International Bank & Trust Limited (In Liquidation)**:

“[4] In reviewing the exercise of a judge’s discretion, an appellate court ought not to impose its discretion even if it would have exercised its discretion differently. Interference with a judge’s discretion will only be warranted if the judge misunderstood the law or the evidence. So too, if the judge arrived at conclusions on inferences which were correct at the trial but at the appeal, a change in circumstance or the emergence of further evidence rendered the decision to be plainly erroneous – (see Lord Diplock’s statement (at page 220) in **Hadmor Productions Ltd and Others v Hamilton and Another** [1983] 1 AC 191). Or, if the judge, as Lord Fraser of Tullybelton in **G v G** [1985] 2 All ER 225, 229 put it, ‘has exceeded the generous ambit within which a reasonable disagreement is possible’...”

[51] In this matter, the learned judge demonstrated that he had a clear understanding of the law. However, he erred in its application to the facts of the case, as he did not recognize that in the absence of a defence indicating firstly, that vicarious liability was being accepted and secondly, that the actions of the other respondents were closely connected to their duties as servants or agents of the Crown, it was imprudent for the claim to be struck out against them at that stage.

[52] Accordingly, we find that there is merit in grounds d, e, f and g and that the order sought at paragraph 4, that the claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents be reinstated, should be granted.

## **Issue 2: Whether the claim for breach of the social contract should have been struck out – ground c**

[53] The appellant has sought an order for the reinstatement of paragraphs 50 to 52 of the amended particulars of claim. These three paragraphs of the appellant's pleadings relate to the claim for breach of the social contract.

### Submissions on behalf of the appellant

[54] Counsel submitted that the claim for breach of the social contract is one that is known in this jurisdiction and that this is by virtue of the fact that the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter') has a horizontal application to its subjects. It was argued that the contract on which the appellant sought to rely is the social contract which has formed the fundamental basis of the relationship between citizens and their governments and has been the bedrock of legal studies for over three centuries. It was also submitted that "...the social contract has been the backbone and underpinning of the fabric of the Constitution of Jamaica and has wound its way through governance and legislation". The Constitution, it was submitted, is evidence of the said social contract. Reference was made to the Canadian case of **Gillian Frank v Attorney General** 2019 SCC 1, in which Wagner CJ stated:

"[20] .... Strathy C.J.O., writing for the majority, relied heavily on this Court's decision in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 ("*Sauvé #2*"), to find strong support for the social contract both in political theory and in this Court's jurisprudence, and to conclude that preserving it was a valid objective for the purposes of the s. 1 analysis...

[48] The social contract, famously espoused in the work of the 18th century philosopher Jean-Jacques Rousseau, is purportedly manifested in the connection between the electors and the elected; citizens have a right to elect

lawmakers, and a parallel duty to obey the laws enacted by their elected representatives. The majority of the Court of Appeal accepted that preserving the social contract is a pressing and substantial objective for the purposes of the s. 1 analysis. In the majority's opinion, '[p]ermitting all non-resident citizens to vote would allow them to participate in making laws that affect Canadian residents on a daily basis, but have little to no practical consequence for their own daily lives. This would erode the social contract and undermine the legitimacy of the laws' (para.6)."

[55] Further, it was contended that the social contract has been birthed from the principles of natural law. Reference was made to a number of scholarly articles, "The Constitution is the social contract so it must be a contract ... right? A critique of originalism as interpretive method" (2007) by Paul Lermack; "Is the constitution a social contract?" by Michael Stokes; and "A social contract argument for the state's duty to protect from private violence" by Liliya Abramchayev.

[56] So as not to do any injustice to counsel's submission, it is set out thus:

"It is therefore clearly understood, and we submit that in order for the Constitution to give effect to its purpose in society i.e. to maintain law and order and good governance, it functions as a social contract, binding the Government and holding it, through its Crown servants and agents accountable for action/omission committed which are ultra vires. It follows therefore that a breach of this contract, like any other, gives rise to a cause of action in civil law."

[57] In the case at bar, it was contended that the appellant's claim for breach of the social contract could properly be brought as such, because it is synonymous with a claim for breach of constitutional rights and the express terms of the contract between citizens and the government are set out in extensive detail in the Constitution.

[58] Further, the remedies sought for breach of the social contract are akin to those available under ordinary contractual principles.

[59] Counsel took issue with the applicability of **Sebol Limited and Selective Homes & Properties Limited v Ken Tomlinson (As the Receiver of Western Cement Company Limited), National Investment Bank of Jamaica Limited, the Registrar of Titles and Pan Caribbean Financial Services Limited (Formerly Trafalgar Development Bank Limited)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2007, judgment delivered 12 December 2008 (**'Sebol'**), which was relied on by counsel for the respondents before Palmer J. It was submitted that that case was inapplicable as the facts in the present case are entirely different.

[60] It was contended that, in the present case, the Government had failed to protect the appellant's liberties to which he was assured under the Constitution, and that in the interest of justice his claim for damages for breach of the social contract ought to be allowed to proceed.

#### Submissions on behalf of the respondents

[61] It was submitted that the learned judge did not err in taking the approach that the appellant needed to establish that breach of the social contract is a cause of action known to the law in this jurisdiction and further in finding that it was not a cause of action, but a consideration in constitutional law.

[62] Reference was made to the **Sebol** case wherein this court interpreted rule 26.3(1)(c) of the CPR to require that a known cause of action be disclosed. Dukharan JA, on behalf of the court, stated:

"27. Also in **Drummond Jackson v. British Medical Association and Others** [1970] 1 WLR 688, Lord Pearson observed at page 695 that:

'Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should only be exercised in plain and obvious cases.'

It can be seen from those authorities that before a claim can be struck out it must clearly be obvious that no reasonable cause of action is disclosed.

28. The focus on the new rules is to deal with matters expeditiously and to save costs and time. If there are no reasonable grounds for bringing an action then the court ought to strike it out. **Under the old rules once the pleadings indicated some known cause of action then it is hardly likely to be struck out.**" (Emphasis supplied)

[63] It was submitted that there is an absence of case law demonstrating that breach of the social contract is a cause of action in this jurisdiction. Counsel stated that the appellant has failed to cite any case in this regard but has instead sought to rely on the opinions of academic writers which unless adopted by a court cannot establish any legal principles. Accordingly, the learned judge was correct in finding as he did, namely that the concept is a fundamental consideration in constitutional law issues. This was supported by counsel for the appellant's submission that the "social contract which the Constitution creates between the Government and its citizens ascribes rights and responsibilities to which each party is bound".

## **Analysis and findings on issue 2**

[64] There is some overlap between this issue and issue 3. A useful starting point is to set out the three paragraphs which the appellant is seeking to have reinstated, namely paragraphs 50, 51 and 52 of the amended particulars of claim:

"50. Further and/or alternatively the claimant seeks to rely on one of the foundation legal principles of the social contract. The origin of the principle can be traced to the seventeenth century with Thomas Hobbes and was further developed in the seventeenth century by John Locke and in the eighteenth century by Jean Jacques Rousseau.

51. The central thrust of the principle is that individually, humans in society have given up their individual and collective/group rights to protect themselves, to the state, on the express condition that the state will and would always act in the best interest of the community at large and would at

the very least apply social rules fairly, justly and equally to all members of the society for the benefit of all members of the society.

52. In the modern context, the social contract operates through a complex web of express and implied terms. Chief among these is that the citizens will be subject to mandatory taxation which is used by the Government to fund the costs of services and provisions of the state. Additionally, the social contract expects that all citizens will obey the laws/rules/instructions passed by the Government and organisations, agencies and agents of the Government when they are acting in their public capacity. In return the Government is under a duty to apply the rules/laws fairly, justly and equally to all the citizens of the society." (Emphasis as in the original)

[65] The learned judge exercised his power under rule 26.3(1)(c) of the CPR which provides:

"26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

(a)...

(b)...

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d)..."

[66] At paragraphs [42] to [44] of his reasons for judgment, the learned judge stated:

"[42] Paragraphs 50, 51, and 52 are struck out since they disclose no cause of action. In ***Baptiste v Attorney General GD 2014 HC 15***, the case of Mitchell, J.A. in ***Tawney Assets Limited v. East Pine Management Limited and Ors*** Civ Appeal HCVAP 2012/007 at paragraph 22 stated: -

'The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in

exceptional cases...The court must thus be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial.'

"[43] The Claimants have prayed for a breach of social contract. The Defendants/Applicants submit that breach of social contract is not a claim known to civil law. The Defendants have relied on **Sebol Limited v Ken Tomlinson** SCCA No 115/2007, unreported (delivered January 15, 2010) and submit that where there is no cause of action known to law there can be no reasonable justification for bringing the claim and therefore it should be struck out.

[44] Based on my perusal of authorities, **I find that breach of social contract is not a cause of action known to law., [sic] it is a fundamental consideration in the determination of issues concerning constitutional law. Therefore, the Claimant cannot rely on this ground and the claim, insofar as it relates to this ground, is struck out.**" (Emphasis supplied)

[67] Upon a perusal of paragraphs 50, 51 and 52 of the amended particulars of claim, it is noted that these paragraphs, although interesting for their recount of legal theory/philosophy (which broadly pertains to the nature of law, rights and justice and the use of the law to enforce morality) are a rather unusual inclusion in the appellant's statement of case. Whilst it is recognised that a claimant has a duty to set out the facts on which he intends to rely, rule 8.9 (2) of the CPR provides that "[s]uch statement must be as short as practicable...". Palmer J, in addressing this point stated, at paragraph [35]:

"[35] I find that the Claimant's submission, in trying to maintain the spirit of the Rules as they say, has led to a bulky presentation of the alleged facts. The Particulars are riddled with generalities, assumptions and conclusions which violate the fundamental rules of pleadings. Furthermore, the Claimant/Respondents seem to have overlooked Rule 8.9 (2) which states that the statement must be as short as practicable."

[68] Implicit in the “facts on which the claimant relies” is that what is contained in the particulars of claim must be relevant to the issues to be determined by the court. In a sense, rule 26.3 of the CPR allows the court to function as a gatekeeper insofar as it confers on the court the power to strike out a statement of case (in whole or part) where it (a) fails to comply with a rule/direction, (b) abuses the court’s process/obstructs the just disposal of proceedings, (c) discloses no reasonable ground for bringing/defending a claim, or (d) is prolix.

[69] Counsel for the appellant sought to equate a claim for breach of the social contract with a claim for constitutional redress under section 19 of the Charter.

[70] I have noted, however, that counsel for the appellant did not present any case law to the learned judge, or this court, which supported the contention that a claim for breach of the social contract could reasonably be brought. In particular, the appellant was unable to provide a single authority (from any commonwealth jurisdiction or otherwise) where a claim was brought for a breach of the social contract and was adjudicated upon.

[71] The learned judge, in treating with this issue, relied on the principle in the **Sebol** case. That principle states that the court’s power to strike out a statement of case as disclosing no cause of action should only be exercised in plain and obvious cases. Palmer J’s decision to strike out the claim for breach of the social contract and his reasoning in relation thereto, cannot be faulted. There is therefore no basis for the reinstatement of paragraphs 50, 51 and 52 of the particulars of claim.

[72] In the circumstances, the order sought at paragraph 3 that the claim for breach of the social contract be reinstated is refused.

**Issue 3: Whether the striking out of the claim against the other respondents and the claim for breach of the social contract, deprives or prevents the appellant from obtaining damages for breach of his constitutional rights – grounds a, b and c**

### Submissions on behalf of the appellant

[73] The essence of the submissions made by counsel for the appellant is that the claim of breach of the social contract is synonymous with one for a breach of a citizen's constitutional rights. The express terms of the contract between the citizens and the Government it was submitted, are set out in the Constitution and the application of the Constitution is now both horizontal and vertical. Reference was made to the decision of the full court in **Maurice Arnold Tomlinson v Television Jamaica Ltd and others** [2013] JMFC Full 5 (**Maurice Tomlinson**) wherein it was recognised that the provisions of section 13(1)(a), (c) and (5) "brought the concept of horizontal application of the Charter of Rights".

[74] It was asserted that the respondents had a personal obligation not to violate the constitutional rights of the appellant and such a violation gave rise to a claim enforceable by an action for breach of a private right. In the circumstances, it was reasonable to bring the claim as pleaded as "the citizen [sic] of Jamaica, in particular the present Appellant, are sick and tired of the continued breaches of their constitutional rights and are now ready to take action against parties responsible for the breaches in ways that will bring home to them, in very clear fashion, that their actions are unacceptable, reprehensible and must be discontinued with no repetition in the future".

### Submissions on behalf of the respondents

[75] Counsel for the respondents took no issue with the principle that there is now a horizontal application of the Charter, as recognised by the full court in **Maurice Tomlinson**. However, it was submitted that the claim brought by the appellant was neither a constitutional claim under part 56 of the Civil Procedure Rules ('CPR'), nor did it seek constitutional redress pursuant to section 19 of the Charter. It was stated that, based on the dictum of Patterson JA in **Doris Fuller v Attorney General** (1998) 56 WIR 337 (**Doris Fuller**), there is a clear distinction between a claim for constitutional redress pursuant to section 19 of the Charter and the raising of questions in relation to a breach of constitutional rights in the course of an action or pleading. In the instant case,

the appellant, it was submitted, has raised a constitutional question as a means of emphasizing the horrific treatment which was allegedly meted out to him the other respondents in their capacity as Crown servants. As such, the question of the horizontal application of the Charter between private citizens pursuant to a claim for constitutional redress would not apply.

[76] It was also submitted that, having regard to the fact that the pleadings demonstrated that the acts complained of were committed by the other respondents during the course of their employment as Crown servants and the issue of the alleged infringement of the appellant's constitutional rights being directly related to the tortious acts committed by them, any liability for any damages in this regard would be against the Crown. Therefore, the striking out of the claim against the other respondents, would not deprive the appellant from obtaining damages in connection with the multiple breaches of his constitutional rights as raised.

### **Analysis and findings on issue 3**

[77] The appellant's contention is that the learned judge erred:

(i) "in failing to recognize and appreciate that his judicial function required the exercise of a discretion which would permit the appellant to have his claim heard, particularly as the claim is one against the state for having abused his rights under law and under the Charter (ground a);

(ii) in exercising his discretion against the weight of the constitutional rights of the appellant and failing to take these rights into account, and instead ruled in a manner consonant with a judicial culture of support for the Crown and its agents. The claim by the appellant is predominantly in respect of false imprisonment and malicious prosecution and is therefore effectively a claim pursuant to section 13(3)(a) of the Charter being the constitutional right to liberty, which ought to be jealously guarded and protected within the Court's jurisdiction (ground b); and

(iii) in failing to acknowledge that the new appreciation of constitutional rights, is that their application is both horizontal and vertical, that is to say the respondents had an obligation, and even

more so as agents of the state, not to violate the constitutional rights of the appellant herein and accordingly such a violation gives rise to a cause of action for breach of a private right by the appellant against the respondents, and further that the Constitution creates a social contract between its subjects and the Crown and her officers/agents/servants (ground c).”

### The nature of the claim

[78] In this matter, the claim form states that the appellant is claiming damages for breaches of his constitutional rights. The amended particulars of claim at paragraphs 29, 41, 44 and 48 set out in some detail the facts on which the appellant intends to rely in support of that claim.

[79] The said amended particulars of claim contain various allegations of constitutional breaches. In some instances, there were attempts at setting out the provisions of the Constitution which were alleged to have been breached. It is best to set out and refer to the relevant paragraphs in the amended particulars of claim –

“29. The claimant was without reasonable and probable cause and/or maliciously arrested and brought to the Elleston Road Police Station. At the Police Station, the claimant was questioned about the gun and ballistic vests. During this Gestapo style interrogation/questioning session, when the claimant gave responses asserting his innocence and/or gave any responses which his interrogators did not like he was beaten on his knuckles with a thick wooden ruler which was in the interrogation room. In total the claimant was slapped on his knuckles in excess of 20 times. The claimant submits that the actions of the investigating officers/interrogators were acts of torture, which were a breach of his human rights, in particular Article 5 of the Universal Declaration of Human Rights and specifically **Article [sic] 17 of Chapter III of the Jamaican Constitution...**”

“41. The claimant alleges that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were guilty of maliciously procuring his arrest and viciously and violently assaulting and battering the claimant in his removal to the police station and the interrogation which followed on his arrival there. The 1<sup>st</sup> and 2<sup>nd</sup> defendants as well as other police officers who are still unknown, were guilty of torturing

the claimant and violating his fundamentals [sic] rights guaranteed under the Universal Declaration of Human Rights and **the Charter of Rights in the Constitution of Jamaica...**

42. The claimant alleges that the 3<sup>rd</sup> and 4<sup>th</sup> defendants are liable for the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as they were acting as agents of the state and/or employees and/or agents of the 4<sup>th</sup> defendant..."

[80] Also, under the heading of "Particulars of Cruel and Unusual Punishment and Loss of Quality of Life" it was alleged at paragraph 44 (d) and (e)(viii)(2):

"The claimant was unlawfully deprived of the opportunity to interact with his children over the period of his incarceration. This is in violation of his right to family life under Article 12 of the Universal Declaration of Human Rights and **section 13(c) of the Jamaican Constitution.**"

"The claimant submits that this was an act of torture and inhuman treatment contrary to **Article [sic] 17, of Schedule II Chapter III of the Jamaican Constitution.**"

[81] Under the heading of "Particulars of Injurious Falsehood" in paragraph 48, it was alleged at various subparagraphs that as a result of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' actions the appellant was deprived of his rights which are guaranteed under the Constitution. Specific reference was made to section 15 of the Constitution.

[82] Section 19(1) of the Charter provides for applications for constitutional redress. It states as follows:

"19(1) If any person alleged that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Rules 56.9(1)(b) and (3)(c) of the CPR also make provision for a claim for constitutional redress. They provide as follows:

## How to make an application for administrative order

“56.9(1) An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for –

- (a) ...
- (b) relief under the Constitution;
- (c) ...
- (d) ...

and must identify the nature of any relief sought.

(2) The claimant must file with the claim form evidence on affidavit.

(3) The affidavit must state –

- (a) ...
- (b) ...
- (c) in the case of a claim under the Constitution, setting out the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;
- (d) ...
- (e) ...
- (f) ...
- (g) ...”

[83] The appellant has elected to proceed by way of a claim form and has pleaded the facts on which he relies and has also highlighted the constitutional provisions that were allegedly breached. However, there was no assertion that the claim was being made pursuant to section 19(1) of the Constitution. In **Doris Fuller** Downer JA made the point that there is a distinction between a claim in tort and one for constitutional redress. He stated at pages 372-373:

"...an action pursuant to s 25 of the Constitution enforcing fundamental rights is an 'action against the State or by some other public authority endowed by law with coercive powers'. Chapter III is concerned with 'public law not private law'. The Crown Proceedings Act by virtue of s 3 enables a litigant to sue the State in tort in defined circumstances...

But a breach of Chapter III provisions arises directly under the Constitution. Constitutional law imposes duties on the State for the benefit of those within its borders. No private person can set up a prison system, save with permission of the State. So we are in an area beyond the province of the law of torts...

Chapter III of the Constitution fixes the State with responsibility of guaranteeing fundamental rights and freedoms."

[84] Patterson JA at page 393 stated:

"The pleadings did not aver that the claim for constitutional redress was by virtue of the provisions of s 25 of the Constitution...

In short, the appellant did not apply to the Supreme Court pursuant to the provisions of s 25 for redress...

**It seems to me that there is a clear distinction between an application for constitutional redress pursuant to s 25 of the Constitution and the raising of any question under the provisions of ss 14 to 24 (inclusive) of the Constitution in the course of any action or proceedings.** In the instant case, the appellant raised, by the pleadings, the question relating to inhuman and degrading treatment meted out to the deceased by servants of the Crown, particularly during the time of his incarceration. In my view, the pleadings in paras 6 to 8 of the statement of claim are not in nature a substantive application for constitutional redress. But they raised a constitutional question in the action for tortious liability in order to emphasise the horrific treatment to which the deceased was subjected. In accordance with r 3 (iii) of the Judicature

(Constitutional Redress) Rules 1963, the judge was empowered to 'determine such a question and give effect to such determination so far as applicable' in the action before him. The judge did not make an award in respect of the claim for constitutional redress..."

The learned judge of appeal continued at page 397:

"As I have already stated, the pleadings alleged 'inhuman and degrading treatment' as the contravention that formed the basis of the claim for constitutional redress. Counsel for the appellant commenced his arguments on that basis only. However, during the course of his arguments, he applied to amend his pleadings to include an allegation of 'torture'. Counsel for the Attorney-General objected and, after hearing arguments, the court decided by a majority to refuse the application for amendment.

There can be no doubt that the evidence established that the deceased was subjected to inhuman and degrading treatment. That was not contested."

He continued at pages 399 - 400:

"The inhuman and degrading treatment to which the deceased was subjected resulted from his being placed and confined for a protracted period in a cell that was grossly overcrowded, pitch dark, poorly ventilated, wet and extremely hot, and his being deprived of adequate food and water. Such treatment falls well outside the norm that is expected when persons are taken into the custody of the State and the State has admitted it. The only question that remained was whether adequate means of redress for such contravention were available or had been available to the deceased under any other law... The claim in the instant case for constitutional redress involves a consideration separate and apart from the tortious liability of the Attorney-General. It involves a liability in the public law of the State. It is not a liability in tort, as the appellant rightly submitted. It was further submitted that no remedy at law existed prior to the Constitution which could adequately compensate the deceased for the horrific treatment meted out to him. I think there is merit in this submission. The State failed in its duty to guard against such

treatment. The State contravened the constitutional rights of the deceased and I can think of no other law which, in the circumstances of this case, would provide adequate remedy to redress such a contravention. The common law is deficient in these circumstances. **The only remedy is provided by the Constitution, and the trial judge should have so determined and given effect thereto in his judgment. His failure so to do makes it incumbent on the court to consider the appropriate form of redress applicable in this case**". (Emphasis supplied)

[85] In this matter, questions have been raised regarding the treatment of the appellant by agents of the State. I agree with counsel for the respondents that, in the absence of an indication that the claim was being made pursuant to section 19(1) of the Constitution, it was not properly brought as an application for redress under the Charter. However, rule 56.7(1) and (2) of the CPR empowers the court to treat with a claim which may have arisen otherwise than by a way of a claim for an administrative order or for constitutional redress under section 19 (1) of the Constitution, where the facts as pleaded support such a claim. In the instant case, the pleadings have clearly raised the issue of whether there have been various breaches of the appellant's constitutional rights. In light of the views expressed by Patterson JA in **Doris Fuller**, the court would be obliged to treat with those allegations. In addition, the appellant could apply for an amendment to his pleadings at a later stage in the proceedings, if necessary.

[86] Having found that the claim against the other respondents ought not to have been struck out, the remaining issue is whether the striking out of the claim for breach of the social contract deprives or prevents the appellant from obtaining damages for breach of his constitutional rights. We are of the view that it does not, as the paragraphs relating to those breaches have not been struck out. As stated by Palmer J at paragraph [44] of his judgment "...breach of social contract is not a cause of action known to law, it is a fundamental consideration in the determination of issues concerning constitutional law". In the circumstances, the striking out of the claim for breach of the social contract would not result in the appellant being deprived of the right to claim any breach of his constitutional rights and to obtain damages as a remedy for the same, if proved.

[87] The issue of the horizontal application of the Charter was raised by counsel for the appellant. Prior to the promulgation of the Charter, constitutional remedies were available for the infringement of the fundamental rights and freedoms provisions by the State. This has been described as the vertical application of the Charter. Section 13(5) of the Charter provides for the enforcement of those rights between individuals natural or juristic. This was confirmed by the full court in **Maurice Tomlinson**. Section 13(5) of the Charter states as follows:

“A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right.”

[88] In this case, the principles relating to both the vertical and horizontal application of the Charter will need to be considered unless the Attorney General accepts that it is liable for the acts of the other respondents, if proved. In which case, only the vertical application of the Charter would arise.

[89] For the reasons indicated, grounds a, b and c are without merit and cannot succeed.

[90] I am constrained to address counsel for the appellant’s allegation that the learned judge, in exercising his discretion, did so in a manner consonant with a judicial culture of support for the Crown and its agents. That statement is extremely unfortunate and unfounded. Such an appalling allegation of partiality, which can be taken as being aimed not only at the learned judge but at all judicial officers, has not been supported credibly or at all, and may even be viewed as a false allegation/unjust criticism against a judicial officer, is in our view, unacceptable (see Canon V of the Legal Profession (Canon of Professional Ethics) Rules).

## **Conclusion**

[91] Based on the reasons as stated above, I propose that the following orders be made:

- (1) The appeal against the decision of Palmer J made on 15 February 2019 is allowed in part.
- (2) The orders sought at paragraphs 2 and 3 of the notice of appeal filed on 18 February 2019 are refused.
- (3) The order made by Palmer J at paragraph ii of the judgment in relation to paragraphs 50, 51 and 52 of the particulars of claim is affirmed.
- (4) The order made by Palmer J at paragraph iii of the judgment is affirmed.
- (5) The order made by Palmer J at paragraph iv of the judgment is set aside.
- (6) The claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents is reinstated.
- (7) The appellant shall file an amended claim and particulars of claim within 21 days of this order.
- (8) The time for filing of the 3<sup>rd</sup> respondent's defence shall be 42 days from the date of service of the amended claim and particulars of claim.
- (9) The appellant is awarded 50% of his costs.

**PHILLIPS JA**

**ORDER**

- (1) The appeal against the decision of Palmer J made on 15 February 2019 is allowed in part.

- (2) The orders sought at paragraphs 2 and 3 of the notice of appeal filed on 18 February 2019 are refused.
- (3) The order made by Palmer J at paragraph ii of the judgment in relation to paragraphs 50, 51 and 52 of the particulars of claim is affirmed.
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- (5) The order made by Palmer J at paragraph iv of the judgment is set aside.
- (6) The claim against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents is reinstated.
- (7) The appellant shall file an amended claim and particulars of claim within 21 days of this order.
- (8) The time for filing of the 3<sup>rd</sup> respondent's defence shall be 42 days from the date of service of the amended claim and particulars of claim.
- (9) The appellant is awarded 50% of his costs.